**YII CHEE MING**

**v.**

**TEO AH KING & ANOR**

HIGH COURT SABAH & SARAWAK, KUCHING
ZAKARIA SAM JC
[CIVIL SUIT NO: 22-156-99-III/II]
1 MARCH 2001

***CIVIL PROCEDURE:*** *Jurisdiction - Forum conveniens - Proper forum - Whether action to be filed in Malaysia or Singapore - Purchase of property - Whether a loan or gift - Cause of action - Whether cause of action arose in Malaysia or Singapore - Courts of Judicature Act 1964, s. 23(1)(a)*

The plaintiff had filed a claim against the defendants for the recovery of a certain sum which was allegedly advanced to the defendants as a loan to purchase certain property in Singapore. The defendants then took out a summons-in-chambers praying *inter alia,* among others for an order staying all further proceedings in this action on the grounds of *forum conveniens* until further order, together with costs. The deputy registrar allowed this third prayer by the defendants, hence this appeal by the plaintiff which is confined solely against the said order.

It was the defendants' defence that the payment of the sum for the purchase of the property by the plaintiff to them was a gift for the professional services rendered by the first defendant.

The plaintiff rebutted, submitting that the first defendant's allegations in respect of services rendered on various projects were either never materialised or shelved or had problems or the defendant himself had personal interest in them.

The main issue for determination is which court is the *forum conveniens* to try the action herein; *ie*, whether it is the High Court in Malaysia or the High Court of the Republic of Singapore.

**Held:**

**[1]** The defendant's defence must involve the calling of witnesses in respect of the projects relied upon by the defendants in support of their alleged entitlement to such a gift. From the first defendant's affidavit, most of the projects listed down were in Malaysia, with a vast majority in Sarawak. Therefore, the defendants cannot deny that the witnesses who will be called to substantiate the defendants' allegations must be in Malaysia, mostly in Sarawak.

**[1a]** Only four of the defendants' witnesses in Singapore are compelled to give evidence in the High Court there. As for the witnesses in Malaysia, they are not compelled to give evidence at the trial of this action in Singapore. Without these witnesses, it is unlikely that the defendants could prove their allegations in Singapore. Furthermore, the number of witnesses from Malaysia far exceed the four witnesses in Singapore.

**[2]** The defendants admitted that all monies for the purchase of the property came directly from the plaintiff. The cause of action against the defendants arose in Kuching, Sarawak as this is where the monies were in fact remitted from and where the monies ought to have been paid by the defendants to the plaintiff on demand. This also satisfies s. 23(1)(a) of the Courts of Judicature Act 1964. Accordingly, the contract having been made in Kuching, the laws applicable would be the Laws of Malaysia.

**[3]** Even if the defendants could prove that the loan was a gift, the issue of the property being purchased in Singapore is irrelevant in determination of the *forum conveniens*. With that gift, a property could be bought anywhere in the world. Therefore, considering when most, if not all, the evidence and witnesses are in Sarawak, the High Court in Kuching would be the most appropriate forum to deal with the issues raised in the claim and defence.

*[Plaintiff's appeal allowed with costs.]*

**Case(s) referred to:**
*American Express Bank Ltd. v Mohamed Toufic Al Ozier & Anor [1995] 1 CLJ 273* ***(refd)***
*Malacca Securities Sdn Bhd v. Loke Yu [1999] 6 MLJ 112* ***(refd)***
*Spiliada Maritime Corp v. Consulax Ltd (The Spiliada) [1987] AC 460* ***(foll)***

**Legislation referred to:**
Courts of Judicature Act 1964, s. 23(1)(a)
Rules of the High Court 1980, O. 12 r. 7, O. 18 r. 19

*For the plaintiff - George Lo; M/s George Lo*
*For the defendant - Paul Tan; M/s Tan, Yap & Tang*

*Reported by Raja Vishnu Sivarajah*

## JUDGMENT

**Zakaria Sam JC:**

The plaintiff had on 30 July 1999 filed a claim against the defendants for the recovery of a sum of RM1,722,681.95. The said amount was advanced by the plaintiff to the defendants at their request and it was agreed that the loan was repayable on demand or alternatively within reasonable time thereafter. The purpose of the said loan was to enable the defendants to purchase an undivided 1/2 share in the property known as No. 49, Tras Street, Singapore (the said property). Despite several oral demands and also through a letter dated 12 July 1999, the defendants failed to pay the said loan.

On 15 September 1999 the defendants took out this summons-in-chamber praying, *inter alia*, for an order:

1) That the plaintiff's writ issued be set aside under O. 12 r. 7 of the RHC, 1980;

2) Alternatively, that the plaintiff's statement of claim be struck out under the inherent jurisdiction of the court and/or under O. 18 r. 19 of the RHC and that the action be dismissed or stayed;

3) Alternatively, that all further proceedings in this action be stayed under the inherent jurisdiction of the court and/or under O. 18 r. 19 of the RHC until further order;

4) Alternatively, in the event the court should disallow the defendants' application, time for the defendant to file and serve their defence and/or counter-claim be extended for a period of 14 days from the date of the order.

This application is supported by three affidavits of the 1st defendant affirmed on 15 September 1999, 13 October 1999 and 16 November 1999 respectively. In opposing this application the plaintiff filed in two affidavits affirmed on 4 October 1999 and 4 November 1999.

On 16 December 1999, when the said application came up for hearing before the deputy registrar, he dismissed the defendants' first two prayers and allowed the third prayer. The defendants did not appeal against the dismissal of the two prayers.

Thus, this appeal by the plaintiff is confined solely to the deputy registrar's order staying all further proceedings in this action on the grounds of forum conveniens until further order, together with costs.

**The Application**

The contention of the defendants is that this court is not the *forum conveniens* to try the action herein. The *forum conveniens* should be the High Court of the Republic of Singapore.

The doctrine of *forum of non-conveniens* has been discussed in detail by the House of Lords in *Spiliada Maritime Corp v. Consulax Ltd (The Spiliada)* [1987] AC 460 at p. 476 C, which defined it as, 'there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and for ends of justice.' It was also defined that the 'conveniens' in *forum non-conveniens* meant suitability or appropriateness of the relevant jurisdiction and not of convenience.

By para. 4 of the 1st defendant's first affidavit, the defendants averred that the half share in the said property was given to the defendants as a gift for the various services rendered by the 1st defendant to the plaintiff and his companies since 1995. By para. 53 of the same affidavit, the 1st defendant further admitted that the monies for the purchase of the said property came directly from the plaintiff *via* KKS Machinery Pte Ltd., a company in which the plaintiff was a director and a shareholder. Even the learned counsel for the defendants in his submission had this to say, "By para. 4 to 42 of Teo's affidavit (1), the 1st defendant has set out how the close relationship and co-operation between the plaintiff and his companies and the 1st defendant came about by his providing various services as a background for which the plaintiff made a gift of the said property to the 1st defendant".

Unmistakably, the defence of the defendants is that the payment of S$1,722,681.95 by the plaintiff to them is a gift for the professional services rendered by the 1st defendant.

The plaintiff on the other hand, by his affidavits, stated that the allegations of the 1st defendant in respect of services rendered on various projects were either never materialised or shelved or having problems or the defendant himself had personal interest in them. In some of the projects mentioned by the 1st defendant, neither the plaintiff nor his companies ever appointed the 1st defendant to act for them. In some other instances the 1st defendant had been paid for the services. This, the plaintiff claimed, is clearly contrary to the defendants' assertion that the said property was a gift in consideration for the services purportedly rendered.

It is abundantly clear that the primary issue to be resolved in this action is, whether the sum of S$1,722,681.95 was a loan to the defendants, or a gift for the services allegedly rendered by the 1st defendant? The buying of the said property is a secondary question. The crucial issue to be decided now is, which court is *forum conveniens*?

It was again held in *Spiliada*'s case, *(supra)*, that:

> In general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay. It is however of importance to remember that each party will seek to establish the existence of certain matters which will assist him in persuading the court to exercise its discretion in his favour, and that in respect of any such matter the evidential burden will rest on the party who asserts its existence. Furthermore, if the court is satisfied that there is another available forum which is *prima facie* the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country. (at p. 476 DE)

This case was cited with approval by our Supreme Court in *American Express Bank Ltd v Mohamed Toufic Al Ozier & Anor* [1995] 1 CLJ 273, which held that the onus is on the applicant to satisfy the court that some other forum is more appropriate.

The pertinent question here is, what prompted or moved the plaintiff to make such a gift of S$1,722,681.95 (equivalent to RM3.7 million) to the defendants? The defendants claimed it was for the various works and professional services they had rendered to the plaintiff and the companies connected to him since 1995. They even itemised an impressive list of the alleged services together with the 1st defendant's credentials which took up most of the 1st defendant's affidavits.

For the purpose of this application, I do not intend to delve in detail into the long list of services itemised herein, in order to avoid the pitfall of discussing the merit of the case proper at this stage. In any event, suffice for me to say that any reference to the defendants' defence that the monies were a gift from the plaintiff for services allegedly rendered by them must involve the calling of witnesses in respect of the projects relied upon by the defendants in support of their alleged entitlement to such a gift. Perusing through the 1st defendant's affidavit, I gather that all the projects he listed down to substantiate his claim are all in Malaysia with a vast majority of them in Sarawak. Therefore, the defendants cannot deny that the witnesses who will be called to substantiate their allegations must be in Malaysia, mostly in Sarawak. The 1st defendant never referred to any project in Singapore at all. By the defendants' own

admissions, these witnesses are from Sarawak Economic Corporation, Land Custody Development Authority, the Chief Minister's Office, Samling Corporation in Miri, various Planning Authorities in Kuching, Sibu, Miri and Bintulu. It is the contention of the defendants that the Court in Singapore is the more appropriate forum as four of their witnesses in Singapore are only compellable to give evidence in the High Court there. If so, the same rule should apply to the witnesses in Malaysia as well. They are also not compellable to give evidence at the trial of this action in Singapore. Without these witnesses how could the defendants possibly prove their allegations in Singapore. Furthermore, the number of witnesses from Malaysia far exceed the four witnesses in Singapore.

It must be noted that the plaintiff is not claiming for the said property purchased in Singapore but the loan he allegedly advanced to the defendants. In fact, the defendants had admitted in paras. 50, 53 and 58 of the 1st defendant's affidavit that all the monies for the purchase of the said property came directly from the plaintiff *via* KKS Machinery Pte Ltd to their solicitor in Singapore. The cause of action against the defendants arose in Kuching as this is where the monies were in fact remitted from and where the monies ought to have been paid by the defendants to the plaintiff on demand. In this regard, I refer to *Malacca Securities Sdn Bhd v. Loke Yu* [1999] 6 MLJ 112, where it was held by Augustine Paul J, at p. 127 as follows:

> In a contract for the payment of money the breach occurs when there is a failure to pay the sum promised. This is logical as the meaning of 'cause of action' is the act on the part of the defendant which gives the plaintiff his cause of complaint (See *Jackson v. Spittall* [1870] LR 5 CP 542,). The failure to pay will be the cause of complaint. That breach will have to be at the place where the payment is to be made and the cause of action will therefore accrue in that place (See *Bank Bumiputra Malaysia Bhd. v. Melewar Holdings Sdn. Bhd. & Ors.* [1990] 1 CLJ 1246. Where there is no agreement as to the place where the payment should be made then the payment should be made at the place where the plaintiff lives.

This also satisfies s. 23(1)(a) of the Courts of Judicature Act 1964. Accordingly the contract having been made in Kuching, the laws applicable would be the Laws of Malaysia.

**Conclusion**

For the above stated reasons, it is my considered opinion that the High Court in Kuching is the appropriate forum to deal with the issues raised in the claim and the defence. It would be unjust to confine the plaintiff to pursue his remedies in Singapore when most, if not all, the evidence and witnesses are in Sarawak.

If the defendants can prove that the said loan was a gift, the issue of the property being purchased in Singapore is irrelevant. With that gift, he could buy property anywhere in the world.

The plaintiff's appeal is hereby allowed. Costs here and the court below to the plaintiff, to be taxed unless agreed.